IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

vs.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, AND
TOWN OF AVILLA, INDIANA,
MUNICIPAL CORPORATIONS,
Respondents.

BRIEF AMICUS CURIAE OF COMMONWEALTH EDISON COMPANY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

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INTEREST OF THE AMICUS.

Commonwealth Edison Company ("Edison") is a public utility which provides electric service to the northern portion of the State of Illinois. Like the Petitioner here, Edison is the defendant in a treble-damage antitrust action which is currently

pending in the United States District Court for the Northern District of Illinois (*City of Batavia* v. *Commonwealth Edison Company*, No. 76 C 4388). The plaintiffs are certain of Edison's wholesale electric customers. The principal issue in Edison's case is the level of Edison's wholesale rate for electric service, an issue which is also pending before the Federal Energy Regulatory Commission ("FERC") in a ratemaking proceeding (FERC Docket E-9002). Many of the factual and legal issues in Edison's case are quite similar to those in the case now before this Court. A number of other antitrust cases involving electric utility rates which are pending before district courts while rate cases are simultaneously pending before the FERC (*See* the Petition in this Matter at p. 11) also involve similar issues. Because Edison's case is pending before a District Court within the Seventh Circuit, however, the decision of that Court of Appeals has had a direct impact on the rulings of the District Court hearing Edison's case. The effect on Edison of the Court of Appeals' decision can only be alleviated if this Court grants the writ of *certiorari* requested by Indiana & Michigan Electric Company.

ARGUMENT.

I.

A WRIT OF CERTIORARI SHOULD ISSUE TO CLARIFY THE EXTENT TO WHICH CONDUCT EXPRESSLY MANDATED BY ADMINISTRATIVE AGENCIES CAN GIVE RISE TO ANTITRUST LIABILITY.

The Court of Appeals has held that a public utility can be liable to its customers under the antitrust laws for treble damages claimed to result from differences between the levels of two of the utility's rates even though one rate had been ordered into effect by a federal regulatory agency and the other rate had been ordered into effect by a state regulatory agency. In so doing, the Court below did not consider the differing policies which underlie the regulatory and antitrust laws.

The application of the antitrust laws to a regulated industry inevitably requires that a resolution be made among the demands of competing legal and social policies. The antitrust laws are designed to further the competitive processes of the market place. The establishment of a regulatory commission, on the other hand, reflects a legislative decision that unlimited competition would be wasteful of society's resources, or that unlimited competition is impractical because of the existence of conditions giving rise to a natural monopoly.

The conflict between regulation and the antitrust laws is sharpest when a private litigant seeks treble damages for injuries claimed to arise from conduct expressly mandated by a regulatory commission. The present case is the first to reach this Court in which conduct by a utility which has been ordered by agencies acting under the Federal Power Act and under state public utility laws is claimed to give rise to treble damage antitrust liability.

The significance of this case does *not* lie in the fact that it involves the application of the antitrust laws to the electric utility industry. It is quite clear from prior decisions of this Court that electric utilities *are* subject to the antitrust laws.[1] *Otter Tail Power Co.* v. *United States*, 410 U. S. 366 (1973). This case is significant because it involves an attempt to apply the antitrust laws to a situation which has resulted from active, but differing, regulation by federal and state agencies. This case, and the many others like it now pending across the country, involve complaints which call upon the district courts to compare utility rates established by a federal agency against rates established by state regulatory agencies and to render a verdict on their relative propriety. In these cases, for the first time, courts are being called upon to specify the extent to which an electric utility which charges its customers rates established by federal and state regulatory agencies can thereby incur treble damage liability to those customers under the antitrust laws.

The issues raised in this case are not resolved by the Court's opinion in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976). That case dealt with conduct, the sale of light bulbs, peripheral to the State's interest in utility regulation. This case involves the level of rates, a matter at the core of both state and federal regulation of electric utilities. The decision in *Federal Power Commission* v. *Conway Corp.*, 426 U. S. 271 (1976), is likewise in no way dispositive of this matter. In ordering the FPC to consider possible anticompetitive effects in establishing rates the Court in *Conway* was dealing only with the scope of the FPC's obligations under the Federal Power Act. Potential conflicts between regulatory and antitrust jurisdiction were not considered in that case.

We respectfully submit that the manner in which such conflicts should be resolved is a matter deserving the substantive attention of this Court.

1. In this regard, the Petition now before the Court differs materially from that recently denied in *American Telephone & Telegraph Co.* v. *United States*, Docket No. 77-372.

II.

STATE AND FEDERAL ADMINISTRATIVE AGENCIES HAVE PRIMARY JURISDICTION OVER UTILITY RATES.

A. The Decision Below Improperly Encroaches on the Ratemaking Authority of Regulatory Agencies.

The opinion below recognizes that the authority to establish rates for electric utility service has been vested in administrative agencies of both the States and the federal government. The opinion below also recognizes that the district courts have neither the authority nor the technical expertise to determine the level of utility rates. Having assumed these principles, however, the Court of Appeals went on to hold that a district court could grant a plaintiff damages on the ground that the plaintiff had been paying too high an electric rate (App. p. 26a).[1] The Court of Appeals also held that a district court could order a utility to file a rate schedule in the form specified by the court (App. p. 27a). According to the Court of Appeals, such actions by a district court would not be an interference with the ratemaking process (App. pp. 25a, 26a). Obviously, however, an award of damages is economically equivalent to a rebate, a refund, or any other means of retroactively lowering a utility rate, *Georgia* v. *Pennsylvania RR. Co.*, 324 U. S. 439 (1945). Similarly, an injunction directing a utility to file rates of a specified form and level after different rates have been mandated by an administrative agency is a clear interference with the agency's jurisdiction and an attack upon the agency's actions. The fact that the Court's order might issue in response to a private antitrust complaint would not alter its effect as an otherwise prohibited collateral attack on an agency decision.

The practical effect of the decision below is to ignore the legislative declaration that rates be established by administra-

1. References to "App. ....." are to the Appendix to the Petition for a Writ of *Certiorari* in this case.

tive agencies with particular expertise in ratemaking. Instead, the Court of Appeals would apply the antitrust laws to ratemaking in a manner which would give the courts effective control over the level of all utility rates. In reaching this decision, the Court of Appeals erred twice. It failed to recognize that the establishment of rates by administrative agencies is central to the legislative scheme of utility regulation, and it failed to give due regard to the expertise of administrative agencies in the complex area of ratemaking. Either of these errors would be sufficient to require a reversal of the decision below.

B. The Decision Below Fails to Recognize That the Regulation of Rates Is at the Core of Administrative Regulation of Utilities.

The decision below is based on the express belief that agency ratemaking is *not* a central aspect of the regulation of public utilities and that a district court accordingly need not defer to regulatory jurisdiction (App. pp. 16a, 17a, 27a). This belief is clearly erroneous. The establishment of utility rates has long been accepted as a fundamental part of the regulation of public utilities by government, *Munn* v. *Illinois*, 94 U. S. 113 (1877). It is axiomatic that a utility is prohibited from charging rates different from those ordered by a regulatory body. *See, e.g.*, § 205 of the Federal Power Act, 16 U. S. C. 824d. Federal regulation of the wholesale electric business came principally to fill the "gap" in state *ratemaking* authority perceived after the decision in *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U. S. 83 (1927). *See Federal Power Commission* v. *Southern California Edison Co.*, 376 U. S. 205 (1964). Because ratemaking is a complex and specialized task, Congress and the legislatures of the States have generally delegated this function to administrative bodies, but the actions of those bodies have the force of legislative acts, *Bluefield Water Works & Improvements Co.* v. *Public Service Comm.*, 362 U. S. 679 (1923).

Generally, although not universally, proceedings before administrative agencies which involve rate increases are instituted by the utilities involved. Contrary to the Court of Appeals' view this does not indicate agency disinterest in the level of rates, but rather a reasonable determination that as long as a utility is satisfied with the level of its rates, it is unlikely that the public interest requires that those rates be raised.[1] The procedural device of permitting utilities to petition for changes in rates does not detract from the fundamental importance to the regulatory scheme of ratemaking by state and federal agencies without court interference. See, *Federal Power Commission* v. *The Hope Natural Gas Co.*, 320 U. S. 591 (1944).

The Court of Appeals' belief that ratemaking is not fundamental to the regulatory process arises from an erroneous reading of *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976). At the time of its decision the Court of Appeals did not have the benefit of this Court's opinion in *Bates* v. *State Bar of Arizona*, ... U. S. ....., 97 S. Ct. 2691 (1977), which explained that *Cantor* involved particular conduct (the sale of light bulbs) which was "not essential to the State's regulation of electric utilities" 97 S. Ct. at 2697. Rate regulation is essential to utility regulation and so, in this respect, the decision below is in error.

C. The Court of Appeals Failed to Recognize the Administrative Expertise Required to Establish Utility Rates.

The decision below errs by failing to consider the expertise of administrative agencies in ratemaking. The Court of Appeals found that agency expertise would not assist a district court in its fact finding task (App. p. 27a) even though the facts at issue involved the reasonableness of utility rates. The decision below suggests that the district court could (and perhaps must)

1. During periods of falling electric rates, such as much of the 1960's, proceedings to lower rates were routinely instituted by the regulatory agencies.

substitute its own views on ratemaking for those of the administrative agencies involved (App. pp. 20a, 21a, 27a). This is contrary to the basic principles of administrative law and to clear legislative mandate, *Federal Power Commission* v. *The Hope Natural Gas Co., supra.*

In establishing rates, an administrative agency will act largely on the basis of a determination of the cost a utility incurs in providing service, but it must also consider a variety of other economic, social and public policy issues. See generally Bonbright, Principles of Public Utility Rates (1960), Ch. 4 to 8. (In the case of FERC, one issue which must be considered is the question of any anti-competitive effect of the rates, *Federal Power Commission* v. *Conway Corp., supra.*) Even when consideration is limited to costs alone, however, different rate levels will result from the application of different theories of pricing, different methods of cost allocation, and even different methods of accounting, Similarly, an agency's selection of the rate of return which it will authorize a utility to earn is a decision requiring the application of expert judgment. A well developed body of law recognizes the expertise of administrative agencies in such matters, and limits the scope of judicial review of such determinations. See Davis, Administrative Law Treatise, § 29.09.

D. Courts Should Not Re-examine Rates Established by Regulatory Agencies.

The needless conflict which the Court of Appeals created between regulatory statutes and the antitrust laws can be avoided by application of the doctrine of primary jurisdiction. A district court which is faced with an antitrust complaint against a utility should defer to the rulings of the appropriate administrative agencies on issues involving the level or structure of rates.

This is not to suggest that all of the actions of electric utilities are immune to antitrust challenge. It is to suggest only that the *rates* which a utility charges cannot be challenged collaterally, at least to the extent they are actively regulated by a federal or state agency. The district courts would still have the ability to hear, and remedy, cases involving anticompetitive actions.

Conduct which a district court can clearly deal with because it is outside of, or peripheral to, the regulatory process includes conduct like that involved in *Otter Tail* and *Cantor, supra.* Similarly, utility abuse of the regulatory system could give rise to antitrust liability. Although the *Conway* case, *supra*, did not involve an action before a district court, the facts alleged in that case, if proven, would supply an example of such abuse. In *Conway* it was alleged that a utility had deliberately and voluntarily depressed its retail rates for the purpose of injuring a competitor, 426 U. S. at 229. Since regulatory commissions are understandably reluctant to grant larger rate increases than utilities themselves claim are necessary, the practical effect of seeking retail rates which are unduly low may be to avoid effective regulation by the state public service commission. The district courts should be free to remedy competitive injuries which arise from such conduct. (The form of remedy which would be appropriate will be one of the issues before this Court if a writ of *certiorari* is granted.) Other situations can also be imagined in which a utility could pervert the regulatory system to anticompetitive ends. In any such situation a district court would be free to act.

Absent such deliberate and voluntary anticompetitive actions, however, a district court should not interfere with the decisions of the federal and state agencies which regulate utility rates.

In particular, district courts should not become forums for the relitigation of contested rate cases.

Respectfully submitted,

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